

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 19, 2007 Session

STATE OF TENNESSEE v. GREGORY L. SAIN

**Direct Appeal from the Circuit Court for Rutherford County
No. F-57513 Don Ash, Judge**

No. M2006-00865-CCA-R3-CD - Filed March 6, 2008

Following a jury trial, Defendant, Gregory L. Sain, was found guilty of one count of delivery of a Schedule II drug to a minor, a Class B felony, one count of possession of a Schedule II drug with the intent to deliver, a Class B felony, one count of introduction of contraband into a penal facility, a Class C felony, one count of contributing to the delinquency of a minor, a Class A misdemeanor, and one count of simple possession of marijuana, a Class A misdemeanor. Following a sentencing hearing, the trial court sentenced Defendant as a Range III, persistent offender, to twenty years for each Class B felony conviction, ten years for his Class C felony conviction, and eleven months, twenty-nine days for each misdemeanor conviction. The trial court ordered Defendant to serve his sentences concurrently, for an effective sentence of twenty years. On appeal, Defendant argues that the trial court erred in denying his motion to suppress, and that the evidence was insufficient to support his conviction of contributing to the delinquency of a minor. Defendant does not challenge the sufficiency of the evidence supporting his other convictions. The State appeals the trial court's Range III, persistent offender, classification, arguing that Defendant's prior history of criminal convictions mandates that he be classified as a career offender for sentencing purposes. After a thorough review, we conclude that the trial court did not err in denying Defendant's motion to suppress and that there was sufficient evidence to sustain Defendant's conviction of contributing to the delinquency of a minor. We also conclude that Defendant is a career offender for sentencing purposes and modify his two Class B felony sentences from twenty years to thirty years, and his Class C felony conviction from ten years to fifteen years, to be served concurrently, for an effective sentence of thirty years.

**Tenn. R. App. P. 3 Appeal as of Right;
Judgments of the Circuit Court Affirmed as Modified**

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH, J., joined. THOMAS T. WOODALL, J., not participating.

David Bragg, Murfreesboro, Tennessee, (on appeal); Gerald L. Melton, District Public Defender; and J.D. Driver, Assistant Public Defender, Murfreesboro, Tennessee, (at trial), for the Appellant, Gregory L. Sain.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and Jude Santana, Assistant District Attorney General, for the Appellee, the State of Tennessee.

OPINION

I. Background

Merissa Allen testified that she was born on September 19, 1986, and was seventeen years old on September 4, 2004, the date of her encounter with Defendant. Ms. Allen said that she went to the Murfreesboro Billiards Club to meet friends. Approximately one hour after she arrived at the club, Ms. Allen went to the parking lot to get something out of her car. A grey vehicle pulled up behind her car. Ms. Allen said that the driver, whom she later identified as Defendant, was the only occupant of the vehicle. Defendant asked Ms. Allen if she knew of any other clubs in the area because he had just been evicted from the Country Club. Ms. Allen told Defendant that Conrad's was located in the Holiday Inn next to the interstate. Ms. Allen said that Defendant handed her something wrapped in a paper towel. Defendant told Ms. Allen to take the package and he would be back later. Ms. Allen said that she felt uncomfortable and scared. Ms. Allen memorized the license tag number of Defendant's vehicle before going back inside the club.

Ms. Allen told Dorothy Foster and Rita Dunn, the co-owners of the club, about the incident, and Ms. Foster called the police. Officer Sean Patrick Garrison with the Murfreesboro Police Department responded to the call approximately five to ten minutes later. Ms. Allen gave the package to Officer Garrison and told him Defendant's license tag number. Ms. Allen believed that Officer Garrison performed a field test on the substance in the package. Ms. Allen said that Officer Garrison then drove to Conrad's to try to locate Defendant's vehicle.

Ms. Allen went back inside the club and joined her friends at a table. A few minutes later, Defendant walked into the Billiards Club and sat down at the bar. Ms. Allen pointed out Defendant to Ms. Foster. Defendant then left the club. Officer Garrison returned to the club, and Ms. Allen identified Defendant's vehicle as it was leaving the club's parking lot. Officer Garrison followed Defendant in his patrol car. A short time later, Officer Garrison returned to the club with Defendant in the back seat of his patrol car. Ms. Allen identified Defendant as the person who had handed her the package earlier that evening.

On cross-examination, Ms. Allen said that her car was parked approximately thirty to forty feet from the entrance of the club and the parking lot was lit. Ms. Allen acknowledged that Defendant did not ask for her name, and she did remember Defendant asking to see her later that night. Ms. Allen said that Defendant did not ask for any money in exchange for the package. Ms. Allen said that Defendant did not approach her when he returned to the Billiards Club.

Officer Garrison testified that he spoke with Ms. Allen who told him that a man had approached her in the club's parking lot and had handed her a wrapped package. Officer Garrison

said that Ms. Allen told him that the man had said that Ms. Allen should come to Conrad's later if she "wanted to have a good time because he had \$300 worth more with him." Ms. Allen told Officer Garrison that the man was an African-American and was driving a silver car with a Tennessee license tag number of LQD 477. Officer Garrison said that the package contained a white powdered substance which he believed was cocaine.

Officer Garrison drove to Conrad's but did not locate the vehicle described by Ms. Allen. He returned to the Billiards Club to fill out an offense report, and Ms. Allen told him that Defendant had returned to the club but had left again. Officer Garrison and Ms. Allen went outside to fill out the forms. Ms. Allen told Officer Garrison, "That's him right there. He's leaving in his car." Officer Garrison observed a silver Mercury Cougar with license tag number LQD 477 leave the parking lot.

Officer Garrison stated that he was approximately twenty feet from the vehicle. The drivers' side window was down, and Officer Garrison identified Defendant as the driver of the vehicle. Defendant did not stop his vehicle when Officer Garrison told him to do so. Officer Garrison got into his patrol car and activated his emergency equipment and the video tape recorder inside the vehicle. Officer Garrison followed Defendant's vehicle through a restaurant parking lot and on to West College Street. Defendant stopped his vehicle about nine-tenths of a mile from the Billiards Club.

Officer Garrison asked Defendant what had transpired at the Billiards Club earlier that night. Defendant acknowledged that he had been at the club but denied any knowledge of the incident described by Officer Garrison. Officer Garrison said that Defendant's pockets contained small torn pieces of a paper towel that were similar to the paper towel package that Ms. Allen had showed him. Officer Garrison placed Defendant under arrest and drove Defendant back to the Billiards Club where Ms. Allen identified him as the individual who had given her the package earlier that evening.

Defendant was taken to the Rutherford County Sheriff's Department for booking. Defendant consented to a search of his person. During the search, Defendant was asked to bend over and squat. Officer Garrison said that he observed a clear plastic baggie protruding from Defendant's buttocks. Defendant resisted the jail personnel's attempt to remove the baggie and was pepper sprayed. Two baggies were removed from Defendant after he was pinned to the ground. The smaller baggie contained what appeared to be a white powder, and the larger baggie contained marijuana.

On cross-examination, Officer Garrison said that he did not run a field test to identify the substance of the package given to Ms. Allen. Officer Garrison said that he went out to his car to retrieve a property envelope in which to store the package. Officer Garrison acknowledged that Ms. Allen provided him more details concerning the motor vehicle driven by Defendant than Defendant's personal appearance.

Deputy Charles Owens with the Rutherford County Sheriff's Department was on duty when Defendant was brought in for booking on September 4, 2004. Deputy Owens testified that Officer

Garrison asked the jail staff to search Defendant. Defendant was taken into a room and asked to remove his clothes. Deputy Owens said that Defendant was calm at the beginning of the search. Deputy Owens observed a clear plastic bag protruding approximately two inches from Defendant's buttocks. Deputy Owens asked Defendant to give them the baggie several times. When Defendant did not comply, Deputy Owens and another jail employee grabbed him and tried to retrieve the baggie. Defendant began wrestling with them, and all three fell to the floor. After approximately five minutes, Deputy Owens sprayed Defendant with Freeze Plus P. Nurse Eric Walker removed the baggies after Defendant was subdued.

Rita Dunn testified that she was working at the Billiards Club on September 4, 2004. Ms. Dunn said that Ms. Allen came into the club and said that someone in the parking lot had given her something. Ms. Dunn took the package to the back of the club and called the police.

Glen Glenn testified that he was a special agent forensic scientist with the T.B.I. Agent Glenn said that he received three sealed packets from the Rutherford County Sheriff's Department on August 10, 2005. Two of the packets contained a white powder, and the third packet contained plant material. Agent Glenn testified that testing of the submitted material on August 16, 2005, revealed that packet 01-A contained 0.05 grams of cocaine, packet 02-A contained 0.4 grams of cocaine, and packet 02-B contained 1.3 grams of marijuana. Agent Glenn said that packet 01-A had a piece of paper inside the evidence bag, and the cocaine was inside the paper package.

II. Motion to Suppress

Defendant argues that Officer Garrison did not have specific or articulable facts to support an investigatory stop of Defendant's vehicle. Defendant submits that Officer Garrison did not observe any criminal activity and had no knowledge of what kind of substance was in the package which had been given to Ms. Allen.

At the suppression hearing, Ms. Allen testified that she walked into the Billiards Club parking lot to retrieve some money from her vehicle. A man drove up and stopped at the back of her vehicle. The man asked Ms. Allen if she knew the location of any clubs. Ms. Allen gave him directions to Conrad's. The man handed her something wrapped in a paper towel and told her he would be back later. Ms. Allen said that she took note of the make of the man's vehicle and the vehicle's license tag number. Ms. Allen told the owner of the club about the incident and the owner called the police. Ms. Allen said that she was present when the responding officer opened the packet, and the packet contained a white powdery substance. Ms. Allen stated that she was not a paid informant for the Rutherford County Sheriff's Department.

On cross-examination, Ms. Allen acknowledged that Defendant did not ask for any money in exchange for the packet, and he did not make a date to see her later that night. Ms. Allen said that she remembered the officer testing the substance in the packet. Ms. Allen stated that the packet appeared to be wrapped in a paper towel and was about one inch in length and width. Ms. Allen said

that the responding officer brought Defendant back to the club in his patrol car, and Ms. Allen identified Defendant as the man who had handed her the packet earlier in the evening.

Officer Garrison stated that he responded to a call about a suspicious person at the Billiards Club on September 4, 2004. Officer Garrison interviewed Ms. Allen who told him that a man had approached her in the parking lot and given her a paper wrapped package. Officer Garrison testified that Ms. Allen told him that the man instructed Ms. Allen to take the packet, and to come to Conrad's later "if she wanted to have a good time because he had \$300 worth more with him."

Officer Garrison said that he opened the package and discovered a white powder which he believed to be cocaine. Officer Garrison did not perform a field test on the substance. Ms. Allen provided Officer Garrison with the license tag number and color of Defendant's vehicle, and Officer Garrison drove to Conrad's in an effort to find Defendant. He was unsuccessful and returned to the Billiards Club after responding to another unrelated call. After he arrived at the Billiards Club, Ms. Allen identified Defendant's silver vehicle as it drove out of the club's parking lot.

Officer Garrison said that he pursued Defendant's vehicle until Defendant pulled over on West College Street. Defendant denied that he had given anything to a woman at the Billiards Club. Defendant consented to a search of his vehicle, and Officer Garrison discovered paper towels similar to that in which the substance given to Ms. Allen had been wrapped. Based on the presence of paper towels in Defendant's vehicle and Ms. Allen's statement, Officer Garrison arrested Defendant and drove him back to the Billiards Club where Ms. Allen identified him as the man who had handed her the package.

On cross-examination, Officer Garrison said that he was made aware of the fact that Ms. Allen was a juvenile and believed that he had asked her for her date of birth to verify her age. Officer Garrison acknowledged that Ms. Allen did not provide any more detailed physical description of the man other than he was an African-American. Officer Garrison said there was "a very small amount" of white powder in the package. Officer Garrison acknowledged that Ms. Allen did not testify at the suppression hearing that Defendant told her to come to Conrad's later but attributed it to a lack of recollection because the conversation had occurred approximately eighteen months earlier.

The trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000). Thus, questions of credibility, the weight and value of the evidence, and the resolution of conflicting evidence are matters entrusted to the trial judge, and the court must uphold a trial court's findings of fact unless the evidence in the record preponderates against them. *Id.* (citing *State v. Odom*, 928 S. W. 2d, 18, 23 (Tenn. 1996)); *see also* Tenn. R. App. P. 13(d). However, application of the law to the facts is a question that an appellate court reviews *de novo*. *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998). Both proof presented at the suppression hearing and proof presented at trial may be considered by an appellate court in deciding the propriety of the trial court's ruling on a motion

to suppress. *State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998); *State v. Perry*, 13 S.W.3d 724, 737 (Tenn. Crim. App. 1999).

The Fourth Amendment to the United States Constitution guarantees that “the right of the people to be secure . . . against unreasonable searches and seizures shall not be violated and no warrants shall issue, but upon probable cause.” Likewise, Article I, section 7 of the Tennessee Constitution guarantees “that the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures....” Thus, the language of both the federal and state constitutions mandates that “a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement.” *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn.1997) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032 (1971)); *see also State v. Garcia*, 123 S.W.3d 335, 343 (Tenn. 2003).

One such exception is a brief investigatory stop by a law enforcement officer if the officer has a reasonable suspicion, based upon specific and articulable facts, that a person has either committed a criminal offense or is about to commit a criminal offense. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968); *Binette*, 33 S.W.3d at 218. This narrow exception has been extended to the investigatory stop of vehicles. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881, 95 S. Ct. 2574, 2580 (1975); *State v. Watkins*, 827 S.W.2d 293, 294 (Tenn. 1992). In evaluating whether a police officer has a reasonable suspicion, supported by specific and articulable facts, a court must consider the totality of the circumstances. *Binette*, 33 S.W.3d at 218. Those circumstances may include the personal observations of the police officer, information obtained from other officers and agencies, information obtained from citizens, and the pattern of operation of certain offenders. *Watkins*, 827 S.W.2d at 294. Additionally, the court must consider any rational inferences and deductions that a trained officer may draw from those circumstances. *Id.* Objective standards apply rather than the subjective beliefs of the officers making the stop. *State v. Norwood*, 938 S.W.2d 23, 25 (Tenn. Crim. App. 1996).

In this appeal, Defendant argues that Officer Garrison unlawfully stopped his vehicle without the requisite reasonable suspicion that Defendant had committed a crime. Defendant submits that Officer Garrison did not observe any criminal activity and did not know what was in the package handed to Ms. Allen. Defendant contends that “the minimal information” provided by Ms. Allen did not provide specific and articulable facts to support the stop.

Tennessee law recognizes a distinction between information provided by citizen informants and that provided by the type of professional, compensated informant from the “criminal milieu.” *State v. Yeomans*, 10 S.W.3d 293, 296 (Tenn. Crim. App. 1999) (citing *State v. Melson*, 638 S.W.2d 342, 354-56 (Tenn.1982)). Information provided by a citizen-informant is presumed reliable if the informant has necessarily gained the information through first-hand experience, and the informant’s motivation for communicating with the authorities is based on the interest of society or personal

safety. *See State v. Luke*, 995 S.W.2d 630, 636 (Tenn. Crim. App. 1998); *see also State v. Melson*, 638 S.W.2d at 354.

The trial court specifically found Ms. Allen's and Officer Garrison's testimony to be credible. The trial court found that:

[t]he Officer was called immediately after she received the drugs, he was given the packet, and he believed it contained illegal narcotics. In addition, he had a description of the vehicle, the license number, and within an hour was shown by Ms. Allen the man who gave her the packet as he drove by in a vehicle with a matching description and license plate number.

Ms. Allen testified that an unknown man drove up to her in the Billiards Club parking lot and handed her something wrapped in a paper towel, telling her he would be back later. Ms. Allen took note of the license tag number and make of the driver's vehicle, and the police were called shortly thereafter. Both Ms. Allen and Officer Garrison testified that the packet contained a white powder which Officer Garrison believed to be consistent with cocaine. Officer Garrison testified that Ms. Allen told him the driver stated that he had "\$300.00 worth more with him" if Ms. Allen wanted to have a good time. Subsequent testing of the substance in the packet revealed it to be 0.05 grams of cocaine. After Officer Garrison returned to the Billiards Club parking lot, Ms. Allen identified the vehicle she had seen earlier as it drove out of the parking lot. Based on our review, we conclude that the information provided by Ms. Allen to Officer Garrison concerning her encounter with Defendant, Ms. Allen's specific description of Defendant's vehicle and license tag registration number, and the substance in the packet which in Officer Garrison's experience appeared to be cocaine, provided reasonable suspicion supported by specific and articulable facts in order to conduct an investigatory stop of Defendant's vehicle. Accordingly, the trial court did not err in denying Defendant's motion to suppress. Defendant is not entitled to relief on this issue.

III. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his conviction of contributing to the delinquency of a minor. Defendant submits that he had no knowledge that Ms. Allen was a minor, and the circumstances in which he encountered her, that is, at night in the parking lot of an establishment that sold alcohol, all suggested that Ms. Allen was an adult.

When a defendant challenges the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced on appeal with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.*; *State v. Tuggle*, 639 S.W.2d

913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

An adult commits the offense of contributing to the delinquency of a minor if he or she

contributes to or encourages the delinquency or unruly behavior of a child, whether by aiding or abetting or encouraging the child in the commission of an act of delinquency or unruly conduct or by participating as a principal with the child in an act of delinquency, unruly conduct or by aiding the child in concealing an act of delinquency or unruly conduct[.]

T.C.A. § 37-1-156(a). A “delinquent act” is defined as:

an act designated a crime under the law, including local ordinances of this state, or of another state if the act occurred in that state, or under federal law, and the crime is not a status offense under subdivision (b)(23)(A)(iii) and the crime is not a traffic offense as defined in the traffic code of the state other than failing to stop when involved in an accident pursuant to § 55-10-101, driving while under the influence of an intoxicant or drug, vehicular homicide or any other traffic offense classified as a felony[.]

Id. § 37-1-102(b)(9).

A panel of this Court has previously concluded that a defendant’s knowledge of the victim’s age is not an essential element of the offense of contributing to the delinquency of a minor. *Bentley v. State*, 552 S.W.2d 778 (Tenn. Crim. App. 1977) (affirming defendants’ convictions for contributing to the delinquency of a minor despite evidence that the seventeen-year-old victim “had physical attributes of a much older woman” and told defendants she was eighteen)); *State v. Christopher Pierce*, No. M2005-01708-CCA-R3-CD (Tenn. Crim. App. at Nashville, July 26, 2006), *no perm. to appeal filed* (citing T.C.A. § 37-1-156(a)). Moreover, the requirement of a culpable mental state, with respect to each element of the offense, has application only to crimes codified in title thirty-nine. *See* T.C.A. § 39-11-301(b)(2006). Because the misdemeanor crime of contributing to the delinquency of a minor is codified in title thirty-seven, the mental culpability requirement of Tennessee Code Annotated section 39-11-301(b) has no application to this offense.

Ms. Allen testified that she was born on September 19, 1986, and was seventeen years old on the date of the offense, September 4, 2004. Defendant was indicted for “aiding or abetting or encouraging the said child in the commission of an act of delinquency, to-wit: drug usage.” Ms.

Allen said that Defendant gave her a package which Agent Glenn testified contained 0.05 grams of cocaine.

Based on the foregoing, we conclude that a rational trier of fact could conclude beyond a reasonable doubt that Defendant was guilty of the offense of contributing to the delinquency of a minor. Defendant is not entitled to relief on this issue.

IV. Sentencing Issue

At the sentencing hearing conducted on March 13, 2006, the State introduced as exhibits Defendant's presentence report and certified copies of judgments documenting Defendant's four convictions in 1994 of possession of cocaine with intent to sell, a Class B felony, and a 1991 conviction of attempted possession of cocaine with intent to sell, a Class C felony. According to the presentence report, Defendant also has seven prior misdemeanor convictions for carrying a concealed weapon, resisting arrest, possession of a weapon with the intent to go armed, casual exchange of marijuana, patronizing prostitution, and two convictions of simple possession of marijuana.

Katrice Dunston with the Tennessee Board of Probation and Parole prepared Defendant's presentence report. Ms. Dunston testified that Defendant had been placed on community corrections, probation, and parole several times as a result of his prior convictions. Defendant's probation was revoked twice in 1994 and again in 1999. Defendant was last released on parole on April 3, 2002, which was to expire on August 4, 2005. Thus, the current offenses which were committed on September 4, 2004, were committed while Defendant was on parole.

Defendant testified on his own behalf at the sentencing hearing. Defendant stated that he was under the influence of drugs on September 4, 2004, when he committed the current offenses. Defendant said that drugs had "taken over [his] life." Defendant stated that he had not used drugs since his arrest in 2004, and he had voluntarily entered a drug program in January 2005. Defendant said that he had passed court-ordered drug tests since his convictions. Defendant accepted responsibility for his offenses but blamed the commission of the offenses on his drug use which led to "bad decisions."

Defendant acknowledged that his four 1994 Class B felony drug convictions occurred within a "very small compressed frame of time." Defendant testified that he could not specifically remember on what date the 1994 offenses occurred.

Defendant said that he had been steadily employed in various dry-cleaning businesses when he was not incarcerated. The presentence report indicates that the owner of one of the dry-cleaning establishments had agreed to rehire Defendant if he were released. Defendant said that he only sold drugs so that he could afford to buy more drugs for his own use. On cross-examination, Defendant acknowledged that he was only drug-free when he was incarcerated, and that he was on parole when he committed the current offenses.

At the conclusion of the sentencing hearing, the trial court found that Defendant was a Range III, persistent offender, for sentencing purposes based on the presence of three prior Class B felonies. The trial court sentenced Defendant to twenty years for each Class B felony conviction, ten years for his Class C felony conviction, and eleven months, twenty-nine days for each misdemeanor conviction. The trial court initially ordered Defendant to serve his Class B felony sentences and his misdemeanor sentences concurrently, and his sentence for his Class C felony conviction consecutively to the other sentences, for an effective sentence of thirty years.

The trial court conducted a second sentencing hearing on March 27, 2006. The trial court modified Defendant's sentence to the extent that it ordered Defendant to serve all of his sentences concurrently. The trial court left unchanged the length of each of Defendant's sentences, for an effective sentence of twenty years.

On appeal, the State submits that at Defendant's sentencing hearing, it provided certified copies of judgments documenting Defendant's prior convictions of four Class B felony drug offenses and one Class C felony drug offense. The State argues that the trial court did not have the discretion to sentence Defendant as a Range III, persistent offender, once Defendant's status as a career offender was established beyond a reasonable doubt. The State does not challenge the trial court's imposition of concurrent sentencing but asks this Court to modify Defendant's felony sentences to reflect his status as a career offender with a release eligibility of sixty percent in accordance with Tennessee Code Annotated sections 40-35-108(c) and 48-35-501(f).

As relevant here, a "persistent offender" is one who has any combination of three Class A or Class B felony convictions if the defendant's conviction offense is a Class A or Class B felony. T.C.A. § 40-35-107(a)(2). A "career offender" is one who has any combination of four Class A or Class B felony convictions if the defendant's conviction offense is a Class A or B felony. *Id.* § 40-35-108(a)(2).

Defendant does not contest the existence of his four prior Class B felony convictions or his one Class C felony conviction. Defendant argues, however, that the determination of a defendant's range classification for sentencing purposes is discretionary with the trial court. Defendant submits, for example, that the statutory language in section 40-35-107 does not "set a cap on the number of convictions beyond which a defendant can no longer be classified as persistent." That is, a defendant must have "*at least* two or more" Class A or a combination of three Class A and Class B convictions in subsection (a)(2) to qualify as a persistent offender. *Id.* § 40-35-107(a)(2). Defendant contends that he has "at least" three Class B felony convictions as required in subsection (a)(2) which support his classification as a persistent offender for sentencing purposes.

The various felony classifications are divided into ranges so that the maximum and minimum sentences may be determined. T.C.A. § 40-35-101, Sentencing Commission Comments. Thus, the range begins with the lowest Range I, and proceeds through Range II, multiple offender; Range III, persistent offender; and career offender, based on the number of prior convictions the defendant has incurred. *See id.* §§ 40-35-105 through 40-35-108. The range classification system reflects the

Sentencing Commission's view that "longer sentences should be imposed on those who have previously violated the law." *Id.* § 40-35-106, Sentencing Commission Comments. If a defendant meets the statutory definition of a particular offender classification, then the defendant "*shall receive*" a sentence within that range, or, if a career offender, "*shall receive*" the maximum sentence within Range III. *Id.* §§ 40-35-106(c); 40-35-107(c); 40-35-108(c) (emphasis added). "It is academic that the use of the word 'shall' in a statute is indicative of a mandatory legislative intent." *State v. Graves*, 126 S.W.3d 873, 877 (Tenn. 2003).

The State relies on *State v. Robert Nix*, No. 136 (Tenn. Crim. App. at Knoxville, Sept. 6, 1991), *perm. to appeal denied* (Tenn., Dec. 30, 1991) as support for its contention that a trial court has no discretion in selecting a range classification once a defendant's prior convictions are established beyond a reasonable doubt. In *Robert Nix*, the defendant argued that the trial court erred in sentencing him as a career offender. The defendant acknowledged that he had the requisite number of prior convictions to trigger the career offender range classification but contended that the 1989 Sentencing Act allowed the trial court the discretion to sentence him as a persistent offender. *Robert Nix*, No. 136, at *2. In rejecting the Defendant's contention, the panel concluded:

[u]nder the 1989 Act, the trial court is obligated to determine the appropriate range of a sentence. T.C.A. § 40-35-210(a). Other than the number of prior felony convictions, the provisions of the career offender statute are the same as that for the persistent offender statute and for the multiple offender statute. T.C.A. § 40-35-106. The Sentencing Commission Comments to the multiple offender statute note that if the defendant has the requisite number of prior convictions, "then the defendant *must* be sentenced as a multiple offender." (emphasis supplied). Obviously, the 1989 Act neither contemplates nor empowers a trial court refraining from applying an offender range status once the trial court has determined beyond a reasonable doubt that the appropriate prior convictions exist to qualify the defendant for that range. Conversely, once the trial court finds beyond a reasonable doubt that the appropriate prior, qualifying convictions exist, the law designates the defendant a career offender and, pursuant to T.C.A. § 40-35-108(c), upon such finding, the defendant "shall receive the maximum sentence within the applicable Range III."

Id. at *3; *see also State v. Rita Davis*, M2000-03227-CCA-R3-CD (Tenn. Crim. App. at Nashville, Nov. 9, 2001), *perm. to appeal denied* (Tenn. May 6, 2002) (concluding that "a trial court has no discretion with respect to the length of the sentence and must impose the maximum sentence pursuant to [T.C.A.] § 40-35-108").

Defendant submits that "it is not uncommon for a defendant to be sentenced at a range classification lower than the one called for by his prior convictions," which Defendant contends further illustrates that the trial court's determination of a defendant's range classification is discretionary. *See, e.g., Seanise Shaw v. State*, No. W2003-02041-CCA-R3-PC (Tenn. Crim. App. at Jackson, Sept. 17, 2004), *no perm. to appeal filed* (a post-conviction proceeding noting that despite her qualification as a career offender, the negotiated plea offer obtained by counsel called for the petitioner to be sentenced as a persistent offender). All of the cases cited in Defendant's brief

reflect a similar scenario. That is, the defendant agreed to be sentenced within a specific range pursuant to a negotiated plea agreement notwithstanding his or her statutory qualification for a higher range classification.

These cases are clearly distinguishable. Our supreme court recently reiterated “that offender classification and release eligibility are non-jurisdictional and may be used as bargaining tools by the State and the defense in plea negotiations.” *Hoover v. State*, 215 S.W.3d 776, 780-81 (Tenn. 2007); *see also Bland v. Dukes*, 97 S.W.3d 133, 134 (Tenn. Crim. App. 2002) (noting that our supreme court has held that offender classification and release eligibility are non-jurisdictional and legitimate bargaining tools in plea negotiations under the Criminal Sentencing Reform Act of 1989) (citing *McConnell v. State*, 12 S.W.3d 795, 798 (Tenn. 2000); *Hicks v. State*, 945 S.W.2d 706, 709 (Tenn. 1997)).

Defendant, however, was convicted by a jury. Following the jury’s verdict, the trial court was required to sentence Defendant pursuant to the 1989 Sentencing Act.

It is not entirely clear from the record why the trial court sentenced Defendant as a persistent offender rather than a career offender. The trial court acknowledged that Defendant has four prior Class B felony convictions and one prior Class C felony conviction. The trial court then stated:

I am going to find that he’s a range 3 persistent offender. As the basis for that I’m going to find that he has a Class B felony and three prior Class B felonies which would put him in that range.

Defendant surmises that the trial court applied the twenty-four hour merger rule to arrive at its determination that Defendant was a persistent offender. *See* T.C.A. § 40-35-107(b)(4). At the sentencing hearing, Defendant argued that he did not know if the dates of the offenses reflected on the judgments for the four Class B felony convictions were accurate. Defendant pointed out that they occurred within a very short time span and submitted that the State had not proven the dates of the offense beyond a reasonable doubt.

For purposes of range enhancement at the time that Defendant committed the offenses, “[c]onvictions for multiple felonies committed as part of a single course of conduct within twenty-four hours constitute one (1) conviction for the purpose of determining prior convictions[.]” T.C.A. § 40-35-108(4) (2004). The certified judgments introduced by the State as exhibits at the sentencing hearing reflect that Defendant committed the four 1994 drug offenses on June 10, June 13, June 15, and July 14 respectively.

For range enhancement purposes, a “certified copy of the court record of any prior felony conviction, bearing the same name as that by which the defendant is charged in the primary offense, is prima facie evidence that the defendant named therein is the same as the defendant before the court, and is prima facie evidence of the facts set out therein.” *Id.* § 40-35-202(a). Our sentencing statutes further provide that “reliable hearsay including, but not limited to, certified copies of

convictions or documents, may be admitted if the opposing party is accorded a fair opportunity to rebut any hearsay evidence so admitted; provided, that this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or Tennessee.” *Id.* § 40-35-209(b).

Defendant was provided the opportunity to rebut the accuracy of the offense dates listed on the certified copies of the conviction judgments but did not do so. Defendant concedes on appeal that the offenses were not committed within twenty-four hours of each other but contends that the offenses should nonetheless be merged because they shared elements of “a single course of conduct.” That is, the prior convictions were entered on the same day by the same court for the same charged offense.

Defendant’s reliance on *State v. John Roy Polly*, No. M1999-00278-CCA-R3-CD (Tenn. Crim. App. at Nashville, Oct. 27, 2000), *no perm. to appeal filed*, in support of this contention is misplaced. In *John Ray Polly*, the issue was not whether some of the defendant’s prior convictions occurred within twenty-four hours of each other, but whether the offenses so committed constituted a single course of conduct for purposes of applying the twenty-four hour merger rule. *Id.* at *3. Various panels of this Court have held “that it is the responsibility of the defendant to establish that offenses which were committed on consecutive days occurred within twenty-four hours of each other.” *State v. Freddie T. Inman, Jr.*, No. W2004-02371-CCA-R3-CD, *10 (Tenn. Crim. App. at Jackson, Mar. 30, 2005), *perm. to appeal denied* (Tenn. Aug. 29, 2005); *see also John Roy Polly*, No. M1999-00278-CCA-R3-CD, at *3 (holding that “where the defendant seeks the application of the twenty-four hour rule and the relevant convictions occur on different days, it is the defendant’s responsibility to demonstrate that the two offenses occurred within twenty-four hours of each other”). In addition, we previously have held that “[t]he date of adjudication or the entry of judgment is irrelevant when applying the twenty-four hour merger rule.” *See State v. David Anthony Lee*, No. E1999-02537-CCA-R3-CD, at *2 (Tenn. Crim. App. at Knoxville, Oct. 6, 2000), *no perm. to appeal filed*.

Based on the foregoing, we conclude that Defendant’s four 1994 Class B felony convictions constitute four separate prior convictions for range enhancement purposes. Because Defendant had the requisite number of prior felony convictions to qualify as a career offender pursuant to Tennessee Code Annotated section 40-35-108, the trial court was obligated to sentence Defendant as a career offender. Because a defendant who is a career offender “shall receive the maximum sentence” within the applicable Range III, we modify Defendant’s sentences to thirty years for each Class B felony conviction, and fifteen years for his Class C felony conviction. T.C.A. § 40-35-108(c).

CONCLUSION

After a thorough review, we conclude that the trial court did not err in denying Defendant’s motion to suppress. We conclude that the evidence was sufficient to support Defendant’s conviction of contributing to the delinquency of a minor, but we conclude that Defendant was improperly sentenced for his felony convictions. We modify Defendant’s felony sentences, to reflect his

classification as a career offender, from twenty years to thirty years for each Class B felony conviction, and from ten years to fifteen years for his Class C felony conviction, all of which are to be served concurrently with each other and with Defendant's misdemeanor sentences, for an effective sentence of thirty years. The trial court shall enter amended judgments imposing the sentences as modified.

DAVID G. HAYES, JUDGE